No. 04-~~750578~~ 70578

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KEVIN COOPER,

Petitioner,

v.

JEANNE WOODFORD, Warden, San Quentin State Prison, San Quentin, California,

Respondent.

DEATH PENALTY CASE

On Application to File Second or Successive Petition for Writ of Habeas Corpus

OPPOSITION TO RESPONDENT'S MOTION TO STAY MANDATE PENDING RESPONDENT'S PETITION FOR WRIT OF CERTIORARI

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Kevin Cooper respectfully submits this Opposition to Respondent's Motion to Stay Mandate Pending Respondent's Petition for Writ of Certiorari. On February 9, 2004, this Court issued its *en banc* order granting Petitioner's application to file a successor petition for habeas corpus relief in *Cooper v. Woodford*, Case No. 04-70578. The Ninth Circuit additionally granted a stay of Petitioner's scheduled execution. Later that day, Respondent filed with a Motion to Vacate the Stay with the United States Supreme Court. *Cooper v. Woodford*, Case No. 03 A687. The United States Supreme Court unanimously denied Respondent's motion.

Despite the Supreme Court's refusal on February 9 ,2004 to disturb this Court's actions and orders, Respondent comes before the Court two days later with the present motion. This motion to stay the mandate is a transparent attempt for reconsideration of the Supreme Court's February 9, 2004 ruling. Respondent has presented no new law and no new facts to support such a motion. The Supreme Court, in deciding to deny the motion to vacate on February 9, 2004 considered and rejected the identical arguments raised by the present motion. Respondent is not entitled to re-raise this issue under the guise of a petition for certiorari. Furthermore, Respondent's argument that this Court did not have the power to conduct an *en banc* vote *sua sponte* is without merit.

REASONS FOR DENYING THE MOTION TO STAY THE MANDATE

Under Federal Rule of Appellate Procedure 41, a "party may move to stay the mandate pending the filing of a petition for writ of certiorari in the Supreme Court." Fed. R. App. Proc. 41(d)(2)(A). A motion to stay the mandate must demonstrate that the certiorari petition would present a substantial question and that there is good cause for a stay. In addition, a motion to stay will be denied if this Court determines that the petition for certiorari "would be frivolous or filed merely for delay." Ninth Circuit Rule 41-1; *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1528 n.3 (1989). Here, the Supreme Court has already considered and rejected the issues raised in her motion. If she wishes to file a petition for certiorari, despite 28 U.S.C. Section 2244(b)(3)(E)'s express prohibition of such a petition, the Supreme Court may reconsider her arguments at that time. Such petition, however, does not present a substantial question, and indeed only raises frivolous arguments already addressed by this Court and rejected by the Supreme Court. There is no need to issue a stay pending Respondent's certiorari petition.

I. THE PROVISIONS OF SECTION 2244(B) PREVENT RESPONDENT FROM FILING THIS MOTION TO STAY MANDATE AS THE ISSUES INVOLVED WERE PREVIOUSLY RAISED AND REJECTED

Under 28 U.S.C. section 2244(b)(3)(E), a party may not file a petition for a writ of certiorari following the grant or denial of an authorization by the Court of Appeals to file a successive habeas application. *See* 28 U.S.C. § 2244 (b)(3)(E). Despite this provision, on February 9, 2004 following this Court's *en*

banc decision granting a stay of execution and authorization to file a successive habeas petition, Respondent immediately filed with the Supreme Court an extraordinary motion to vacate the stay of execution entered by this Court. The motion challenged the ability of the Court of Appeals to grant such relief sua sponte. After consideration, a unanimous court denied Respondent's motion to vacate.

Respondent now proposes to file a petition for certiorari, contrary to the express provisions of section 2244(b)(3(E). Regardless of whether respondent's interpretation of that provision and her strained view of the jurisdictional question she intends to present is correct, Respondent has presented no valid reason to stay the mandate. To allow Respondent to raise issues that have already been presented and rejected is functionally equivalent to a motion for reconsideration. Without a change in the law or the fact of this case, Respondent's motion should be denied. Furthermore, the issues proposed in Respondent's anticipated petition for writ of certiorari are identical to those addressed in the motion to vacate and it is unlikely that such a petition would be granted. The mandate should not be stayed pending Respondent's filing of a frivolous petition.

II. THIS COURT WAS WELL WITHIN ITS AUTHORITY TO *SUA SPONTE* GRANT REHEARING OF THE PANEL'S DECISION

Respondent argues that the Court of Appeals lacked the authority to consider, *sua sponte*, ordering rehearing *en banc* of the panel's decision. The only authority Respondent cites in support of this position is the language from 28

U.S.C. section 2244(b)(3). This subdivision provides, in pertinent part:

> (B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.
>
> . . . .
>
> (E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a *petition for rehearing* or for a writ of certiorari.

(Emphasis added.) No appeal or petition for rehearing is involved here. In particular, Respondent asserts that subsection (E) – which by its express terms merely limits a party's ability to seek further review of a three-judge panel's decision – in some unexplained manner represents Congress's intention to divest this Court, and presumably the Supreme Court, of the inherent power to correct erroneous decisions by three-judge panels. Respondent's claim, rejected by the Supreme Court in its denial of her motion to vacate, misperceives the limitations that Congress intended in enacting section 2244(b)(3)(E) and is contrary to well-established interpretation of the judiciary's inherent powers.

Although Congress can eliminate appellate jurisdiction altogether over certain cases, *Ex Parte McCardle*, 74 U.S. 506 (1868), such limitations do not deprive the courts as established by Congress of the core judicial power in Article III: to decide what the law is. *See, e.g., Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (Article III judicial power to say what the law is upon which the legis-

lation may not intrude, is "deeply rooted in our law") (citing *Marbury v. Madison*, 5 U.S. 1 (1 Cranch) 137, 177 (1803)). The judicial power granted in sections 1 and 2 is the power to declare law, and although section 2 goes on to state that Congress may limit appellate jurisdiction (the Regulations and Exceptions Clause), Congress cannot infringe upon the courts' exclusive right to interpret statutes and determine jurisdiction facts. *See Kuhali v. Reno*, 266 F.3d 93, 100 (2d Cir. 2001) (jurisdiction to determine jurisdiction derives from inherent Article III powers); *Mugalli v. Ashcroft*, 258 F.3d 52, 55 (2d Cir. 2001) ("the determination of jurisdiction is exclusively for the court to decide") (citation omitted).

Moreover, even in cases in which Congress may limit a federal court's jurisdiction, such limitations must be expressly and unequivocally made. As stated in *Webster v. Doe*:

> We emphasized in *Johnson v. Robinson*, 415 U.S. 361, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974), that where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear. *Id.*, at 373-374, 94 S.Ct. at 1168-1169. In *Weinberger v. Salfi*, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975), we reaffirmed that view. We require this heightened showing in part to avoid the "serious constitutional question" that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim. *See Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681, n.12, 106 S.Ct. 2133, 2144 n.12, 90 L.Ed.2d 623 (1986)

486 U.S. 592, 603 (1988); *see also Castro v. United States*, ___ U.S. ___, 124 S. Ct. 786 (2003) (recognizing that courts' doors may not be closed to habeas petitioners "without any clear indication that such was Congress' intent").

Recognizing and applying these principles, the courts of appeal are unanimous in holding that they retain the "authority to order a rehearing sua sponte, despite the provision in Section 2244(b)(3)(E)." *Triestman v. United States*, 124 F.3d 361, 366 (2d Cir. 1997). Indeed, such an interpretation is entirely consistent with this Court's view of the Antiterrorism and Effective Death Penalty Act ("AEDPA") and inherent powers of the federal judiciary. As this court stated in *Thompson v. Calderon*:

> Although § 2244(b)(3)(E) provides that "the grant or denial of an authorization by a court of appeal to file a second or successive application shall not be appealable and shall not be subject to a petition for rehearing of for a writ of certiorari," the language does not preclude sua sponte review by an en banc court. It merely precludes the parties from seeking a rehearing. *See Triestman v. United States*, 124 F.3d 361, 367 (2d Cir. 1997). *Triestman* involved a three judge panel sua sponte ordering a rehearing, but the principle is equally applied to an en banc court sua sponte ordering a rehearing.
>
> . . . .
>
> The parties also agree that, notwithstanding the restrictions on appealability in § 2244(b)(3)(E), this court has the authority to order a rehearing sua sponte. It is well-established that a court of appeals is entitled both to reconsider a prior decision sua sponte, *see, e.g. United States v. Melendez*, 60 F.3d 41, 44 (2d Cir. 1995), *vacated in part on other grounds*, 516 U.S. 1105, 116 S.Ct. 900, 133 L.Ed.2d 834 (1996), and to order a rehearing sua sponte, *see, e.g., Krimmel v. Hopkins*, 56 F.3d 873, 874 (8th Cir.), *cert. denied*, 516 U.S. 1015, 116 S.Ct. 578, 133 L.Ed.2d 501 (1995). By mandating that the initial decision of the court of appeals "shall not be the subject of a petition for rehearing" (emphasis added), § 2244(b)(3)(E) provides only that a disappointed litigant may not ask the court to reconsider its certification decision. By its plain terms, it does not purport to limit the court's own power to review its decisions or to undertake a rehearing. As such, the government concedes, and we agree, that under the AEDPA, a court of appeals retains the authority to order a rehearing sua sponte.

Thompson v. Calderon, 151 F.3d 918, 922-23 (1998). In light of this clear authority, Respondent offers no support for her view that this Court lacks the inherent authority to correct the decisions of three-judge panels.

CONCLUSION

For these reasons, Respondent's Motion to Stay Mandate Pending Respondent's Petition for Writ of Certiorari should be denied.

Respectfully submitted.

FEBRUARY 13, 2004

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DECLARATION OF SERVICE

I am over the age of eighteen years old and not a party to the above-entitled action. My place of employment and business address is Orrick, Herrington & Sutcliffe LLP, Old Federal Reserve Bank Building, 400 Sansome Street, San Francisco, California 94111.

On February 13, 2004, I served a copy of the Opposition to Respondent's Motion to Stay Mandate Pending Respondent's Petition for Writ of Certiorari by placing a true copy thereof enclosed in a sealed envelope, with adequate first-class postage, and deposited in the United States mail at San Francisco, California, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed on February 13, 2004 at San Francisco, California.

_____
Eileen Van Matre